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Court of Appeals
Division I
State of Washington

73306-1

NO. 73306-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CANDY MATTILA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George Appel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's right to due process was violated when the trial court denied her motions for a mistrial and a new trial after the State failed to disclose a material typographical error in a codefendant's plea agreement.

2. The State violated its discovery obligation under CrR 4.7.

3. The prosecutor committed misconduct by referring to facts not in evidence in rebuttal.

4. The trial court erred in denying appellant's motions for a mistrial and a new trial based on prosecutorial misconduct.

5. Cumulative misconduct denied appellant a fair trial.

6. The trial court erred in finding appellant used a motor vehicle in commission of the charged crime.

7. The trial court lacked authority to impose a term of community custody that exceeded the statutory maximum.

Issues Pertaining to Assignments of Error

1. Was appellant's right to due process violated when the trial court denied her motions for a mistrial and a new trial after the State violated its discovery obligation under CrR 4.7 by failing to disclose a material typographical error in a codefendant's plea agreement?

2. Did the prosecutor commit reversible misconduct during rebuttal when he referred to highly prejudicial facts not in evidence?

3. Did cumulative misconduct deny appellant a fair trial?

4. Did the trial court err in finding appellant “used a motor vehicle” in commission of the charged crime, resulting in a one-year suspension of her driver’s license under RCW 46.20.285(4)?

5. Did the trial court err in imposing a community custody term that exceeded the statutory maximum for first-time offenders under RCW 9.94A.650?

B. STATEMENT OF THE CASE

On January 7, 2014, the State charged Candy Mattila with one count of residential burglary. CP 161. The State alleged that on December 29, 2013, Mattila entered and remained unlawfully in Howard Gorlick’s home in Monroe, Washington, with intent to commit the crime of theft, contrary to RCW 9A.52.025. CP 161.

1. Gorlick’s and Police Officers’ Testimony

Gorlick owns a home on Chain Lake Road in Monroe. 4RP 104-05.¹ The house is accessed through a Seventh Day Adventist church parking lot and a long, narrow driveway. 4RP 110-12. His property is very dark and surrounded by woods. 4RP 112-13. Gorlick’s home is extremely cluttered, with “piles of things everywhere.” 5RP 131. He also has several cars

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – February 19, 2015; 2RP – February 26, 2015; 3RP – March 2, 2015; 4RP – March 3, 2015; 5RP – March 4, 2015; 6RP – March 5, 2015; 7RP – March 6, 2015; 8RP – March 24, 2015.

parked outside, the titles to which he claimed he keeps in a kitchen cupboard. 4RP 146, 159-62; 6RP 67-69. The State described Gorlick as a hoarder. 6RP 137.

Gorlick returned to his house around 12:35 or 12:40 a.m. on December 29, 2013. 4RP 106, 111-12. He testified he saw an unknown pickup truck in the driveway and “some people moving around inside the house.” 4RP 113. Gorlick could not their people’s faces. 4RP 172. Gorlick explained he parked his car blocking the truck in, walked back down his driveway, and called the police. 4RP 114.

Officer Darryl Stamey arrived a few minutes later. 4RP 118-19; 5RP 235-36. He spoke with Gorlick, then walked up the driveway to the house and testified he saw three unidentifiable figures with flashlights inside. 5RP 238-39; 6RP 15. Officer Travis Block arrived shortly thereafter. 5RP 93. He testified that as he approached Gorlick’s house, he heard crashing and voices. 5RP 95. He saw three figures with flashlights inside the house, but could not identify them. 5RP 95-96. Stamey and Block testified they then saw the three figures move to the rear of the house and gave chase when they heard rustling in the bushes. 5RP 98, 240.

Officer Jon Richardson arrived next. 5RP 193. He testified he saw two flashlights in the woods behind the house, followed by brighter police flashlights. 5RP 194, 222. As he approached, he heard rustling. 5RP 195.

He found Mattila kneeling near some blackberry bushes and Rockwell lying facedown under the bushes. 5RP 195-96. Mattila followed Richardson's orders to show her hands, but Rockwell refused to cooperate. 5RP 134-35, 223. Block eventually had to grab Rockwell's feet and drag her out from under the bushes. 5RP 134-35. Both women were arrested and transported to the Monroe police station. 5RP 135-36, 196.

Officers also found Sand in the bushes nearby. 5RP 196-97. Sand initially told police he had been sleeping. 5RP 197-98. Deputy Carl Whalen took Sand into custody and searched him incident to arrest. 5RP 85-88. Whalen testified he found vehicle titles and registrations belonging to Gorlick on Sand's person. 5RP 87. Sand told Deputy Whalen that Rockwell had been to the house before and said it was abandoned. 5RP 88-91. In a later search of Sand's and Mattila's truck, police found a box of Coca-Cola bottles, which Gorlick claimed were his. 4RP 123; 5RP 246; 6RP 92.

2. Mattila's Statements to Police and Testimony

At the time of trial, Mattila testified she and Sand had dated for almost four years. 6RP 66. They met Rockwell for the first time on the evening of December 28, 2013 at a mutual friend's house. 6RP 65-66. One of Mattila's friends asked if she and Sand could give Rockwell a ride home, and they agreed. 6RP 66. On the way to Rockwell's house, Rockwell asked if they could stop at the home of her uncle who had just passed away so she

could pick up some items. 6RP 67-68. Rockwell told them her house was only a mile past her uncle's home, so it was on the way. 6RP 67.

When they arrived, all three got out of the truck and Rockwell went inside the house. 6RP 68. Mattila and Sand stayed outside and looked around the front yard at the numerous vehicles there, interested in possibly purchasing one. 6RP 68-69. Mattila explained she and Sand never set foot inside the house. 6RP 70, 81-82. Soon after, Mattila heard Rockwell tell them to run. 6RP 70-71. Afraid and unsure what was happening, Mattila followed Rockwell into the woods. 6RP 71-72. Rockwell then hid in some bushes and told Mattila, "Just get down here. Get down here." 6RP 71-72. Mattila explained she did not take anything from Gorlick's home or go there with intent to burglarize it. 6RP 77-78. Instead she believed they had permission to be there based on what Rockwell told them. 6RP 78.

Upon arrest, Mattila was taken to a holding cell at the Monroe police station and then to an interrogation room. 6RP 74. Officers Block and Tim Buzzell initiated the interrogation. 5RP 103, 228. Consistent with her trial testimony, Mattila told the officers she believed the house belonged to Rockwell's deceased uncle. 5RP 105, 229-34. Mattila said she stayed outside the house while Rockwell went inside. 5RP 230. Buzzell then left the interrogation room and sent in Officer Richardson because Richardson had been present at the scene. 5RP 233.

Richardson testified Mattila said she was in the backyard of the house when Rockwell instructed her to run. 5RP 213. Richardson told Mattila the police had seen three people inside the house and asked Mattila if she stepped inside the house at any point. 5RP 214. Richardson testified Mattila responded she “just stepped in the back door.” 5RP 214. Richardson then left the interrogation room so Block could obtain a written statement from Mattila. 5RP 218.

Block testified Mattila asked him to write the statement for her. 5RP 159. Block handed Mattila the statement to edit and sign, but she signed her name in the wrong place. 1RP 109-10. Block handed it back to Mattila to sign in the correct place and she began crossing off portions of the statement. 1RP 109-10; 5RP 162. Block ripped the statement from Mattila’s hands and refused to return it to her. 1RP 109-10, 121; 5RP 162-63. Block did not know Mattila’s intentions in editing the statement, but testified she said, “I don’t want to get in trouble.” 5RP 184-85. Mattila never signed the written statement under penalty of perjury. 5RP 161.

At a CrR 3.5 hearing, the court admitted Mattila’s oral statements to police. CP 136; 1RP 153. However, court concluded Mattila’s written statement was involuntary: “An officer not allowing a defendant to make the statement read the way they want it to renders it an involuntary statement taken out of her possession, and therefore the written statement is not

admissible in the State's case in chief at trial." CP 136. The court chastised the State: "It would be inappropriate for the State to then indicate this was her adopted statement under those circumstances . . . you cannot put that written statement in as her adopted statement when you ripped it out of her hands while she was changing it." 1RP 154-55.

At trial, the court permitted Mattila's counsel to cross-examine Block about his conduct ripping the statement out of Mattila's hands. 5RP 157. The court ruled Mattila's counsel could ask about the contents of the statement, except to the extent it implicated Sand. 5RP 157. The court specified this then opened the door for the State to ask about Mattila's explanation for crossing out part of the statement. 5RP 158. The court did not admit the written statement into evidence. 5RP 157-58.

On direct, Mattila explained she crossed out part of the statement "[b]ecause it wasn't true." 6RP 76. Then, on cross, the State asked:

Q. Isn't it true that you told Officer Block that Nicole Sand was in the house?

A. No I didn't.

Q. Isn't it true that that was in the statement you signed prior to you crossing that portion out?

A. I don't recall exactly what was in the statement, but I know that the statement was not my words, and that's why I was trying to cross things off that weren't true. . . .

....

Q. Didn't you indicate in your oral statement to Officer Block that Nicole Sand and Amanda Rockwell were in the house but you were not?

A. No, I didn't.

Q. Isn't it true that you became worried that, by pointing out that Mr. Sand was in the house, he could get in trouble and that's why you were striking through that portion of your statement?

A. No....

6RP 87-88.

3. Rockwell's Plea Agreement and Testimony

Rockwell pleaded guilty on June 5, 2014, and testified against Mattila and Sand at trial. 4RP 176, 188. At the time of trial, Rockwell was currently in treatment for her heroin addiction and explained she used heroin on December 28-29, 2013. 4RP 176. In exchange for her testimony, Rockwell received 90 days of inpatient drug treatment instead of 12 to 14 months incarceration. 4RP 189-90. The State also agreed not to file several additional charges against Rockwell, including theft, possession of stolen property, residential burglary, forgery, and identity theft arising from incidents in September 2013, as well as possession of a controlled substance from October 2013. 4RP 191-92. Rockwell admitted to being convicted of

identity theft in 2013, theft in 2010, and making a false statement to a public servant in 2009. 4RP 177-78.

Rockwell testified she met Sand and Mattila on the evening of December 28 and recalled Sand “bragging about car titles that he had gotten.” 4RP 180-81. Rockwell testified it was Sand’s idea to go to Gorlick’s house. 4RP 181. She said Sand backed the truck up Gorlick’s driveway, got out, and then broke open the front door. 4RP 181-82. Rockwell testified she and Mattila followed Sand inside and they all started going through boxes. 4RP 183. Rockwell claimed Sand put some items in the back of the truck, including a box of Coca-Cola bottles. 4RP 183-86. Rockwell testified Mattila said she saw flashlights outside, so they “all took off running out the back door.” 4RP 185.

Rockwell explained her grandfather built the Seventh Day Adventist church near Gorlick’s property, and used to go to church there, but claimed she was unaware of Gorlick’s home. 4RP 179-80; 5RP 20. She lived less than a mile from Gorlick’s house for approximately four years. 5RP 20-21.

Mattila’s counsel began her cross-examination of Rockwell late in the afternoon on March 3, 2015. 4RP 187-88. Counsel asked about Rockwell’s plea agreement where it stated, “The State agrees not to file additional charges of theft arising out of Monroe PD occurring on December 20th, 2013, involving the victim for 1303028 listed in paragraph 8 above and

returned for an agreement to pay restitution for the same.” 4RP 190 (emphasis added). The victim associated with incident number 1303028 was Gorlick. 4RP 190. This indicated Rockwell had stolen Gorlick’s property prior to the charged December 29 burglary, suggesting she had previously been to his house. 4RP 190-91. Shortly thereafter, court was adjourned for the day. 4RP 194.

Mattila’s counsel continued cross-examining Rockwell the following morning. 5RP 4. For instance, on December 29, after being taken into custody, Rockwell told police she was on Gorlick’s property but not inside the house. 5RP 8, 18. Her story changed when she pleaded guilty—she said Mattila and Sand got out of the car, walked to the back of house, and she joined them outside shortly after, but none of them went inside. 5RP 18-23. Rockwell’s story changed again just a few days before trial, the substance of which she testified to in court. 5RP 24. Rockwell said her story kept changing because she was always high before. 5RP 25-26.

Sand’s counsel then cross-examined Rockwell extensively about the December 20, 2013 theft. 5RP 36-39. Rockwell denied being involved in any theft of Gorlick’s property on that date. 5RP 36-37. On re-direct, the State asked Rockwell if it was “possible that a person meant to type December 29th, 2013, but actually typed December 20th, 2013, as a

mistake?" 5RP 45. Rockwell agreed and said she was never investigated for any December 20th theft. 5RP 45-46.

At the end of Rockwell's testimony, Mattila's counsel asked to be heard outside the jury's presence. 5RP 51. The prosecutor explained he realized there was a typo in the plea agreement once Mattila's counsel first cross-examined Rockwell about it on March 3rd. 5RP 60. He reached this conclusion "from my knowledge of this case and my involvement in this case, being aware that there was no other alleged theft under that Monroe police [incident] number, because that [incident] number that's listed is on all of the reports in this case." 5RP 58. On the evening of March 3rd, he telephoned the prosecutor who negotiated Rockwell's plea and told him there was a typo, in order to secure testimony if needed. 5RP 60-61. He did not disclose the typo to the defense. 5RP 51, 63-64.

Mattila's counsel explained the State turned over Rockwell's plea agreement on the day trial started, March 2, 2015, only after defense counsel requested it. 5RP 51. She further explained:

If [the prosecutor] knew it was a typo, he should have told me yesterday instead of surprising us with it today. It makes -- it just doesn't make me look credible. Now I feel like my whole case is in jeopardy. Ms. Mattila's liberty is in jeopardy because now the jury isn't going to believe anything I have to say.

5RP 64. Mattila moved for a mistrial, which Sand joined. 5RP 64, 69.

The court found no discovery violation or “fault on the part of [the prosecutor] in failing to turn over information,” and denied the motion. 5RP 73-74. The court allowed the State to present extrinsic evidence that the incident number in Rockwell’s plea agreement related only to the December 29th offense, and there was no theft on December 20th involving Gorlick. 5RP 189-90. Officer Stamey testified to this. 6RP 11-12.

4. Closing Argument, Motions, and Sentencing

In rebuttal, the State argued, “But you heard -- what was the part of Ms. Mattila’s statement that she crossed through? It was the part about saying that Nicole and Amanda were in the house. Why cross that section out? That’s the common thread between both her and Ms. Rockwell.” 7RP 37. There was no contemporaneous objection, but Sand’s counsel objected immediately following closing arguments, as soon as the jury was excused from the courtroom. 7RP 43-44. He asserted the prosecutor referred to facts not in evidence because Mattila never testified Sand was inside the house and never adopted the written statement as her own. 7RP 44-45, 52. Sand’s counsel explained he waited to object to avoid drawing undue attention to the prosecutor’s improper remark. 7RP 44-45. Mattila and Sand moved for a mistrial. 7RP 49, 57-58.

The trial court assumed the prosecutor referred to facts not in evidence and explained it would have sustained an objection had one been

made. 7RP 63-65. However, in the absence of a contemporaneous objection, the court believed the prosecutor's misconduct needed to be flagrant and ill-intentioned to warrant a mistrial. 7RP 63-65. Refusing to make such a finding, the court denied the motion. 7RP 65.

During deliberations, the jury asked, "Can we see the police reports and any of the suspects' statements?" CP 45. The trial court denied the request. CP 45. The jury subsequently found Mattila and Sand guilty as charged. CP 44; 7RP 71-72.

Following the verdict, both Sand and Mattila moved for a new trial, renewing their objections to the prosecutor's reference to facts not in evidence.² CP 19-41; 8RP 7, 17-18. The court explained, "my memory -- and I feel pretty confident about this -- is that, Mr. Boska, you did make reference to facts which were not in evidence. If there had been an objection, I would have sustained it. Ms. Mattila never said what you thought she said, so there was a mistake." 8RP 41. However, the court again denied the motion because the prosecutor's conduct was not flagrant and ill-intentioned. 8RP 41-43. The court reasoned, "I don't know what was going through Mr. Boska's mind, but you are asking me to make some -- draw some conclusions about what was going on in his mind." 8RP 43.

² Mattila's motion was filed a few days late. 8RP 2. However, the court enlarged the time for filing the motion and reached the merits. 8RP 10-12.

Mattila also moved for a new trial because the State violated its discovery obligation by failing to disclose the typographical error in Rockwell's plea agreement. CP 20-24. Mattila asserted this significantly damaged the credibility of the defense and, as a result, deprived her of a fair trial. CP 23-24. At a hearing on the motion, the prosecutor agreed his knowledge of the typo was not work product and he would have disclosed it had the defense asked him. 8RP 28. Nevertheless, the court concluded there was no discovery violation. 8RP 36-38. The court further concluded "there simply is no discernible prejudice here," and denied the motion. 8RP 40.

The trial court sentenced Mattila to 45 days of confinement, with the possibility of work release. CP 6. The court imposed 12 months of community custody, ordering Mattila to complete a chemical dependency evaluation and comply with all recommended treatment. CP 7. Finally, the court found Mattila used a motor vehicle in commission of the offense, pursuant to RCW 46.20.285. CP 4.

Mattila filed a timely notice of appeal. CP 1.

C. ARGUMENT

1. THE STATE VIOLATED ITS DISCOVERY OBLIGATION AND UNFAIRLY PREJUDICED MATTILA BY WITHHOLDING INFORMATION THAT A CODEFENDANT'S PLEA AGREEMENT CONTAINED A MATERIAL TYPOGRAPHICAL ERROR.

The State must disclose all material exculpatory and impeachment evidence to the defense in a criminal prosecution. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Evidence is “material” if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999). A “reasonable probability” is one sufficient to undermine confidence in the outcome of the trial. Id.

CrR 4.7(a) addresses the prosecutor’s obligation to provide discovery to the defense:

[T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney’s possession or control no later than the omnibus hearing:

- (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

....

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

“There is no distinction between inculpatory and exculpatory evidence under this rule,” and this Court “has expressly declined to forge such a distinction.” State v. Garcia, 45 Wn. App. 132, 137, 724 P.2d 412 (1986); accord State v. Oughton, 26 Wn. App. 74, 79, 612 P.2d 812 (1980).

CrR 4.7(h)(2) makes clear the prosecutor’s duty to provide discovery to the defense is ongoing:

Continuing Duty To Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

This Court has recognized that “promptly” in CrR 4.7(h)(2) means “at the moment of discovery or confirmation, even when that occurs during trial.” Oughton, 26 Wn. App. at 79. A prosecutor’s work product is not subject to disclosure. CrR 4.7(f)(1).

Due process requires the prosecution to “comport[] with prevailing notions of fundamental fairness such that [the defendant is] afforded a meaningful opportunity to present a complete defense.” State v. Greiff, 141 Wn.2d 910, 920, 10 P.3d 390 (2000) (quoting State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). The State’s failure to comply with a discovery rule can violate a defendant’s right to due process. Id. CrR 4.7(h)(7) outlines available sanctions for the State’s discovery violations: “the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” This includes ordering a mistrial. Greiff, 141 Wn.2d at 923 n.5.

A trial court’s denial of a mistrial motion should be reversed when there is an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court necessarily abuses its discretion if it based its ruling on an error of law. Id. Reversal is required if the trial irregularity so prejudiced the jury that the accused was denied the right to a fair trial. Escalona, 49 Wn. App. at 254.

In Greiff, Greiff was accused of raping J.E. 141 Wn.2d at 914-16. At trial, a police officer testified he asked J.E. several times whether she had

been sexually assaulted and she repeatedly said no. Id. at 916. A mistrial was declared after the jury was unable to reach a unanimous verdict. Id. At the second trial, defense counsel stated in opening that the officer would testify J.E. denied being sexually assaulted. Id. at 916-17. However, the officer then testified he never asked J.E. that. Id. at 917. On cross-examination, the officer explained he made a mistake in the first trial and actually never asked J.E. whether she had been raped. Id. at 917-18. Greiff's counsel moved for a mistrial, arguing the prosecutor violated his obligation to disclose the expected change in the officer's testimony. Id. at 918. The trial court denied the motion but admitted the officer's prior testimony in order for the jury "to judge his credibility." Id.

On appeal, Greiff argued the State's failure to inform him about the expected change in the officer's testimony violated CrR 4.7(a)(1)(i), which, in turn, denied him due process of law. Id. at 918-19. The Washington Supreme Court held there was "no question" the State violated its discovery obligations. Id. at 920. The record showed the prosecutor knew as early as the day before the second trial that the officer's testimony would differ significantly, but neglected to inform Greiff's counsel. Id. at 919. The change in the officer's testimony was "certainly information that was discoverable under CrR 4.7(a)(1)(i)" and, therefore, "the State's failure to

notify Greiff of the expected change in [the officer's] testimony was a violation of CrR 4.7(a)(1)(i)." Id. at 919-20.

Here, the omnibus hearing was held on March 13, 2014. Supp. CP__ (Sub. No. 10, Criminal Minute Entry). The prosecutor had a duty to disclose all written statements of witnesses and codefendants by this date. CrR 4.7(a)(i), (ii). Rockwell pleaded guilty on June 5, 2014. 4RP 188. Under CrR 4.7(h)(2), the prosecutor had a continuing duty to disclose the material from Rockwell's plea, and was required to do so "at the moment of discovery or confirmation." Oughton, 26 Wn. App. at 79; accord State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010) ("The State has a continuing duty to promptly disclose discoverable information."). However, the prosecutor did not turn over Rockwell's plea agreement until the day of trial, March 2, 2015, and did so only when Mattila's counsel requested it. 5RP 51. This exceptionally late disclosure violated the State's continuing discovery obligations under CrR 4.7(a)(i) and (ii).

This initial discovery violation left Mattila's counsel without enough time to thoroughly review Rockwell's plea agreement. 8RP 15-16; State v. Brush, 32 Wn. App. 445, 455, 648 P.2d 897 (1982) ("The potential prejudice resulting from the prosecutor's noncompliance with the discovery rules lies in [defense counsel's] inability to properly anticipate and prepare, i.e., surprise."). But the discovery violation did not end there.

Mattila's counsel began cross-examining Rockwell on the afternoon of March 3, 2015. 4RP 187-88. She asked Rockwell about the plea agreement where the State promised not to file additional charges arising from a December 20th theft involving Gorlick. 4RP 190. It was clear she would continue cross-examining Rockwell the following day, and that Sand's counsel would have an opportunity to cross-examine Rockwell. At that point, the prosecutor realized the December 20th date was a typographical error based on his specific knowledge of the case. 5RP 58. That night, he called the prosecutor who negotiated Rockwell's plea to notify him about typo and secure his testimony if needed. 5RP 60-61. But, at no time did the prosecutor disclose the typographical error to the defense, despite knowing cross-examination would continue the next day.

The prosecutor "has a continuing duty to promptly furnish" both inculpatory and exculpatory impeachment evidence "at the moment of discovery or confirmation, even when such occurs during trial." Brush, 32 Wn. App. at 455. The prosecutor agreed his knowledge of the typo was not work product and he would have told the defense had they asked. 8RP 28. But it is the *prosecutor's* duty to disclose material evidence, not defense counsel's duty to ask for it. See CrR 4.7(a), (h). Instead the prosecutor let the defense continue to cross-examine Rockwell about the December 20th theft. 5RP 36-39. Only on re-direct of Rockwell did the prosecutor mention

the typo. 5RP 45. The trial court thus abused its discretion because it made an error of law in concluding there was no discovery violation. Quismundo, 164 Wn.2d at 504.

The State's failure to obey its discovery obligations violated due process because it prejudiced the outcome of Mattila's trial. Greiff is a useful contrast to this case. There, Greiff argued his counsel's credibility was damaged by promising to elicit certain testimony from the officer and then failing to deliver on that promise. Greiff, 141 Wn.2d at 921. The Court held the State's discovery violation did not prejudice the ultimate outcome of Greiff's trial. Id. at 924.

The court concluded that "even if Greiff and his counsel sustained some slight prejudice because of the disconnection between Greiff's counsel's opening remarks and [the officer's] testimony, the trial judge took appropriate curative steps to lessen any negative impact the opening statement may have had on Greiff's counsel's credibility." Id. at 922. Specifically, the court admitted the officer's testimony from the previous trial and instructed the jury to consider it in judging his credibility. Id. "By doing so, the trial court made it clear to the jury that the inconsistency between the opening statement and [the officer's] testimony came about because of [the officer's] eleventh-hour epiphany and not because of any deceptive tactics practiced by Greiff's attorney." Id.

Further, the jury in Greiff was instructed to disregard any statements or arguments by the attorneys that were not supported by the evidence. Id. at 922. The court presumed that the jury followed this instruction. Id. at 923. Given these curative measures, defense counsel's "failure to deliver the promised testimony did not strike a substantial blow to his credibility nor did it hinder his rapport with the jury." Id.

Mattila's case is readily distinguishable from Greiff. Both Mattila's and Sand's counsel cross-examined Rockwell extensively about the December 20th theft. If true, this significantly undercut Rockwell's testimony that she had never been to Gorlick's property before and substantially bolstered Mattila's defense that it was Rockwell's idea to go there. But, instead, the December 20th date was only a typo. As such, the defense looked foolish, even devious, in trying to trap Rockwell in a lie. The defense undoubtedly lost credibility with the jury in the process.

Unlike Greiff, however, the trial court did nothing to clarify for the jury that the defense made an honest mistake, which, of course, stemmed from the State's discovery violations. The court never instructed the jury that the defense was unaware the December 20th date was a typo. Instead, the court compounded the prejudice to the defense by allowing the State to present extrinsic evidence that it was a typo. As defense counsel pointed out, the only way to rehabilitate the defense would be by stipulation or by putting

the prosecutor on the stand to testify the defense was acting on the sincere belief that Rockwell was involved in a theft of Gorlick's property on December 20th. 5RP 118, 190. But neither happened, leaving the defense's credibility damaged beyond repair.

The State's discovery violation resulted in significant damage to the defense, which the trial court refused to cure. This prejudice denied Mattila due process of law and deprived her of a fair trial. This Court should reverse Mattila's conviction and remand for a new trial.

2. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT DURING REBUTTAL BY REFERRING TO HIGHLY PREJUDICIAL FACTS NOT IN EVIDENCE.

The prosecutor improperly referred to facts not in evidence in rebuttal, prejudicing the outcome of Mattila's trial. See State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (recognizing it is prosecutorial misconduct "to make prejudicial statements unsupported by the record"); State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (recognizing that moving for a mistrial after a prosecutor's rebuttal closing argument preserves the issue of prosecutorial misconduct for appellate review). Pursuant to RAP 10.1(g)(2), Mattila incorporates by reference Argument 1 in Sand's brief. See Br. of Appellant Sand, 10-17.

In addition to the cases discussed in Sand's opening brief, State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955), is on point. Reeder was

charged with murdering his second wife. Id. at 888. During cross-examination of Reeder, the prosecutor referred to a divorce complaint filed by Reeder's first wife. Id. at 891. The prosecutor asked, "Now isn't it a fact . . . That she stated that the defendant has struck this plaintiff on numerous occasions, and threatened her with a gun." Id. Reeder denied this accusation. Id. In closing argument, however, the prosecutor referred to Reeder threatening his first wife with a gun as evidence supporting the charged offense. Id. at 891-92.

The Washington Supreme Court held the prosecutor's misconduct warranted a new trial. Id. at 894. The court explained, "There is not one word of testimony in the record that the defendant threatened his first wife with a gun. The only testimony concerning that question is that he did not do so." Id. at 892. The prosecutor knew the court excluded the divorce complaint and that it was not in evidence. Id. The court emphasized the prosecutor "ha[d] no right to mislead the jury," as "a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial." Id. Though defense counsel did not object, "the harm had already been done and it could not have been cured by instructions to disregard the statements so flagrantly made." Id. at 893.

This case is analogous to Reeder. The prosecutor cross-examined Mattila about her written and oral statements to police, asking her, "Isn't it

true that you told Officer Block that Nicole Sand was in the house?” and “Isn’t it true that that was in the statement you signed prior to you crossing that portion out?” 6RP 87. Mattila denied this and denied adopting the written statement as her own. 6RP 87. The prosecutor continued to ask Mattila whether she said Sand was in the house and she continued to deny it. 6RP 88. As in Reeder, there was not one word of testimony that Mattila said Sand was inside the house. The only testimony was that she denied it.

Despite Mattila’s denial that she ever said Sand was inside the house, the prosecutor argued in rebuttal, “But you heard -- what was the part of Ms. Mattila’s statement that she crossed through? It was the part about saying that Nicole and Amanda were in the house. Why cross that section out? That’s the common thread between both her and Ms. Rockwell.” 7RP 37. These “facts” were never admitted into evidence. As the trial court recognized, “Ms. Mattila never said what [the prosecutor] thought she said.” 8RP 41. Further, the written statement was never admitted into evidence. The court emphasized at the CrR 3.5 hearing that once the statement was ripped from Mattila’s hands, “[i]t would be inappropriate for the State to then indicate this was her adopted statement.” 1RP 154. Yet this is precisely what the prosecutor attempted to do in rebuttal, without any supporting facts. This is misconduct under Reeder.

The prosecutor's improper conduct prejudiced the outcome of Mattila's trial. Gorlick and police testified they saw three unidentifiable figures inside the house. Therefore, the only direct evidence that Sand or Mattila went inside the house was Rockwell's testimony at trial, which was dramatically different than her two prior statements. 4RP 181-83; 5RP 18-26. However, the prosecutor's improper remarks put Sand in the house by Mattila's own statement. Given Mattila's and Sand's dating relationship, this was highly suggestive that Mattila was lying when she testified she and Sand thought they had permission to be on the property and never went inside the house. The to-convict instruction stated required unlawful entry by "the defendant or a person to whom the defendant was acting as an accomplice." CP 54. Sand's presence in Gorlick's home made it more likely that Mattila was acting as an accomplice, making it easier to convict her of residential burglary.

The prosecutor's argument also mischaracterized Mattila's testimony. Mattila consistently denied saying Sand was in the house. The prosecutor's assertion in rebuttal that she did, in fact, write that Sand was in the house undermined her credibility. It suggested she was lying during cross-examination when she testified she never said Sand went inside the house. The prosecutor's statement further invited the jury to speculate about the contents of Mattila's written statement, which was not admitted into

evidence. Indeed, during deliberations, the jury asked to see “any of the suspects’ statements.” CP 45. This undoubtedly included Mattila’s written statement, given the prosecutor’s emphasis on it in rebuttal. Indeed, “comments at the end of a prosecutor’s rebuttal closing are more likely to cause prejudice.” Lindsay, 180 Wn.2d at 443.

The prosecutor’s improper reference to “facts” not in evidence prejudiced the outcome of Mattila’s trial. This Court should reverse Mattila’s conviction and remand for a new trial. Reeder, 46 Wn.2d at 894.

3. CUMULATIVE MISCONDUCT DENIED MATTILA A FAIR TRIAL.

“[T]he cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Here, the prosecutor violated his discovery obligations and referred to facts not in evidence in his rebuttal argument, undermining the defense’s credibility and prejudicing the outcome of Mattila’s trial. Even if this Court determines these multiple instances of prosecutorial misconduct do not warrant reversal standing alone, their cumulative effect deprived Mattila of a fair trial.

4. THE COURT ERRED IN FINDING MATTILA “USED” A MOTOR VEHICLE IN COMMITTING THE OFFENSE.

The trial court found Mattila “used a motor vehicle” in committing the burglary. CP 4. This results in a one-year suspension of Mattila’s driver’s license. RCW 46.20.285(4); CP 10. Pursuant to RAP 10.1(g)(2), Mattila incorporates by reference Argument 2 in Sand’s brief. See Br. of Appellant Sand, 17-22. Because Mattila did not “use” a motor vehicle to accomplish the burglary, the trial court’s finding and order directing the Department of Licensing to revoke her license must be vacated. State v. Alcantar-Maldonado, 184 Wn. App. 215, 230, 340 P.3d 859 (2014).

5. THE COURT ERRED WHEN IT IMPOSED A COMMUNITY CUSTODY TERM THAT EXCEEDED THE STATUTORY MAXIMUM FOR FIRST-TIME OFFENDERS.

A trial court may only impose a sentence that is authorized by law. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A judgment and sentence is facially invalid when the court imposes a sentence longer than the statutory maximum. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). Whether a court exceeded its statutory authority under the Sentencing Reform Act of 1981 (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The trial court sentenced Mattila as a first-time offender because she has no prior felony history. CP 5-6; 8RP 45-52. The SRA's first-time offender provision, RCW 9.94A.650, allows courts to waive a standard range sentence for certain offenses. It also permits courts to impose only a short period of community custody: "The court may impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year." RCW 9.94A.650(3).

The trial court ordered Mattila to participate in a chemical dependency evaluation "and fully comply with all recommended treatment." CP 7. The court also ordered Mattila to serve 12 months of community custody. CP 7. However, the community custody term may only "include up to the period of treatment." RCW 9.94A.650(3). This language does not automatically extend the community custody period to 12 months if treatment is ordered. Rather, the community custody term may extend up to six months, plus the period of treatment, "but shall not exceed one year." Id.

The maximum amount of community custody the trial court can impose here is six months, plus the time needed for treatment, so long as it does not exceed one year. If Mattila completes treatment in less than a year, then her community custody must end, under the plain language of the first-time offender wavier statute. But the judgment and sentence currently

specifies she must serve 12 months of community custody, regardless of when she finishes treatment. This is erroneous and renders the judgment and sentence facially invalid. This Court should remand to the trial court for correction of the error. Tobin, 165 Wn.2d at 176.

6. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Mattila to be indigent and entitled to appointment of appellate counsel at public expense. Supp. CP__ (Sub. No. 66, Order Authorizing Appeal In Forma Pauperis Appointment of Counsel and Preparation of Record). If Mattila does not prevail on appeal, she asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court therefore has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Mattila’s ability to pay must be determined before discretionary costs can be imposed. However, the trial court made no such finding. CP 5. Instead, the

trial court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. CP 8.

Without a basis to determine that Mattila has a present or future ability to pay, this Court should not assess appellate costs against her in the event she does not substantially prevail on appeal.

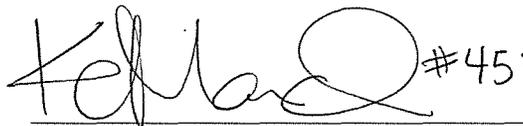
D. CONCLUSION

This Court should reverse Mattila's conviction and remand for a new trial because the State violated its discovery obligation, irreparably damaging the defense, and committed prejudicial misconduct in rebuttal. This Court should also remand for resentencing because Mattila did not use a motor vehicle in commission of the offense and because the community custody term exceeds the statutory maximum for first-time offenders.

DATED this 30th day of December, 2015.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73306-1-1
)	
CANDY MATTILA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CANDY MATTILA
 51628 SKYKO DRIVE
 INDEX, WA 98256

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2015.

X *Patrick Mayovsky*